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NOTES.

CARRIERS—DISCRIMINATION—SERVICES OUTSIDE OF PUBLIC PROFESSION—When a carrier goes beyond the scope of its public profession or renders gratuitously to a portion of its patrons a service which it does not hold itself out as willing to render for the public in general, a form of discrimination arises quite as significant in its legal aspect as discrimination in the matter of rates. As to the state of the law on the subject, there is no doubt,[1] but in view of the unusual practical importance of its effect when applied to existing conditions, its operation is interesting to observe.

Of such a result, a series of more or less related cases which have come before the Interstate Commerce Commission furnish an admirable illustration. In 1912 a confectionery merchant with a

[1] Chicago & N. W. Ry. v. People, 56 Ill. 365 (1870).

shop located at some distance from the center of the city of Washington, conceiving that he was being discriminated against by certain railroads in that city, in that store-door deliveries of interstate freight consigned from certain points were being made free of charge to merchants in Georgetown whose shops were situated at a greater distance from the railroad station than his own, petitioned the Interstate Commerce Commission for relief. Though the practice in question had been in existence for nearly thirty years, the Commission found that discrimination existed and issued an order directing its abatement.[2]

Less than five months later a similar case came before the Commission.[3] The citizens of Anacostia, a suburb, inspired by the success of the earlier petition, urged that there was discrimination in the extension of store-door deliveries to Georgetown and other sections of Washington, when it was denied to them. The Commission found that this service was unjustly withheld from Anacostia and ruled accordingly.

But this matter was not destined to remain long of purely local significance; the previous cases had paved the way for a case of far greater consequence.[4] The carriers, influenced by the two prior decisions, proposed to withdraw entirely the free-delivery service from the city of Washington. The Commission properly held that the motive of the carriers was immaterial, even though it might be in retaliation to the former orders of the Commission, and to avoid the extension to the points therein indicated, but held that to withdraw the service at Washington would be discrimination in favor of Baltimore, and so refused to allow it.

The final and climactic chapter in the story was thereupon written when, in order to effect the withdrawal at Washington, the service was withdrawn at Baltimore also.[5] An immediate protest was voiced by the Merchants and Manufacturers' Association of Baltimore, which contended that in view of the discontinuance of the service, the existing rates were unreasonably high, but the Commission found the rates as continued neither unreasonable nor unjustly discriminatory.

Three cases involving this principle have recently come before the Supreme Court of the United States. While the general rule as laid down in *The Express Cases*[6] permits a carrier to discriminate between patrons, such as other railroad companies with whom it is

[2] Casassa v. Pennsylvania Railroad Co., 24 I. C. C. 629 (1912).

[3] Anacostia Citizens Association v. B. & O. Railroad Co., 25 I. C. C. 411 (1912).

[4] Washington, D. C. Store-Door Delivery, 27 I. C. C. 347 (1913).

[5] Merchants' & Manufacturers' Assn. v. Baltimore & Ohio R. R. Company, 30 I. C. C. 388 (1914).

[6] 117 U. S. 1 (1886). For a discussion of the opposite view see 4 R. C. L., § 61.

not dealing as shippers, under the Act of 1887 a railroad is placed, in its relation to other railroads and within certain limitations, in substantially the same situation that it occupies in respect to shippers.[7] This act, while prohibiting discrimination and compelling the interchange of facilities, contains a proviso that a carrier shall not be required to give the use of its tracks or terminal facilities to another carrier.

In *Pennsylvania Company* v. *United States*,[8] it was held that an order of the Commission requiring a carrier to desist from its practice of refusing to interchange carload freight with one connecting carrier within the switching limits of a city, while performing such service in connection with other connecting carriers within those limits, was not in violation of the proviso of the Act of 1887, as requiring a carrier to give the use of its tracks or terminal facilities to another carrier.

In *Louisville and Nashville Railroad* v. *United States*[9] two carriers furnished switching service to each other in their yards, and to a third carrier on all except coal and competitive business. The Commission directed the two carriers to eliminate this discrimination by furnishing such service to the third on all commodities for which they furnished such accommodations for each other. On behalf of the respondents it was contended that this order was in violation of the Act of 1887 and constituted a violation of the constitutional provision against taking property without due process of law. It was pointed out that the order in *Pennsylvania Company* v. *United States*[10] was to *discontinue* discrimination, while here there was an affirmative order to devote their property to the use of a competing carrier, but this argument apparently had no effect.

The last of the three cases has a more intimate bearing upon the Washington delivery cases, since it involves services furnished to individual shippers and not to connecting railroads. A railroad company had erected six-ton scales adjacent to its stockyards in fifty-four towns in Minnesota, which scales were not connected with the tracks or buildings of the railroad. The Minnesota Commission ordered the installation of a similar scale in the village of Bertha. The Supreme Court of Minnesota found that the scales in question installed at fifty-four of the defendant's stations were not used in the transactions between carrier and shippers. It appeared that cattle actually shipped were weighed upon track scales after the stock was loaded and not upon the scales at the stockyards. The scales were used by dealers in buying and selling in the towns where they had been placed, and though it clearly appeared that

[7] Act Feb. 4, 1887, 24 St. at L., 380 Chap. 104, Comp. Stat. 1913, § 8565.
[8] 236 U. S. 351 (1915).
[9] 238 U. S. 1 (1915).
[10] *Supra*, note 8.

these instruments had no direct part in transportation or selling at terminal yards, they were convenient in stock dealings and tended to bring business to a town and to give it an advantage over a place where none existed. The railroad did not controvert the finding that discrimination existed. The Supreme Court, however, held that the order directing the installation of an additional scale amounted to the deprivation of property without due process of law, and that the commission should have given the railroad the alternative of abating the alleged discrimination by discontinuing the use of existing scales.[11]

The services complained of in this case unquestionably constituted a preference to the towns supplied, but it is interesting to note the further finding that they were wholly unconnected with the carrier in its relations with shippers. In this particular the Minnesota case differs essentially from the delivery cases, where the services, though likewise gratuitous, were performed by the carrier *as carrier* and bore a relation to the ordinary undertaking of carriers, *viz.*, the transportation and delivery of goods. The railroad, however, did not contest the finding that discrimination existed and merely attacked the order of the Commission because it was not in the alternative. The interesting question, therefore, whether a carrier may favor a town by a gratuity entirely unconnected with transportation was not presented.

Such cases assume importance chiefly as striking examples of the manner in which an apparently well-intentioned liberality on the part of carriers toward a considerable portion of their patrons is often frustrated by the objection of the minority to the apparent economic prejudice of the public at large. But upon the assumption that equality of opportunity is of paramount public importance no other conclusion is possible.

B. M. K.

CONSTITUTIONAL LAW—DOES A STATE WORKMEN'S COMPENSATION LAW APPLY TO AN EMPLOYEE OF AN INTERSTATE RAILROAD WHEN ENGAGED IN INTERSTATE COMMERCE?—The question as to whether the Federal Employers' Liability Act and a state workmen's compensation act can both be applied to regulate the liability of an interstate railroad for injury to an employee engaged in interstate commerce,—the former covering injuries resulting from negligence and the latter covering injuries not resulting from negligence,—has recently been decided in the affirmative by the New York Court of Appeals.[1]

The plaintiff was employed in connection with the general

[11] Great Northern Railway Company v. Minnesota, 238 U. S. 340 (1915).

[1] Winfield v. N. Y. Central & H. R. R. R., Weekly Underwriter (N. Y.), Nov. 27, 1915, p. 667.

repair and maintenance of the tracks of the defendant railroad. While tamping ties, he was struck in the eye by a stone which came up from the ground. An award of compensation to the workman under the state act was upheld on the ground that the federal act is an assumption of Congressional control only as to liability for injuries resulting from negligence, thus leaving the field of liability for injuries not resulting from negligence open to state regulation.

That this workman was engaged in interstate commerce and hence entitled to recovery only under the federal act, if his injury had been the result of negligence, is, in view of the facts of the decided cases, a conclusion over which there can be no dispute and which was so considered in the principal case. A case in the Supreme Court of the United States,[2] in which a workman who was carrying bolts to be used in repairing a bridge over which interstate trains were run, was held to be engaged in interstate commerce, is illustrative of this line of decisions.[3]

But since the injury was the result not of negligence, but of unavoidable accident, the question whether a recovery can be had under the state act is governed by two considerations, *viz.*: first, whether the regulation of the liability of interstate railroads to their employees for injuries received while engaged in interstate commerce is exclusively within the control of Congress by virtue of Article I, Section 8, Clause 3 of the Constitution and hence prohibited to the states regardless of any action by Congress, or whether it is a subject matter concerning which the states may legislate until Congress has prohibited such legislation by itself regulating the subject matter in whole or in part; and second, if the latter proposition be found to be true, whether the general subject of the liability of interstate railroads to its employees engaged in interstate commerce can be said to consist of two separate and distinct subject matters, one the liability for injuries resulting from negligence and the other the liability for injuries not resulting from negligence, so that Congressional legislation as to the first liability does not preclude state legislation as to the second liability.

The first problem can readily be resolved in favor of the second alternative. The proposition that, in the absence of Congressional action, the state has the right, in the exercise of its police power, to enact laws determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce, admits of no argument.[4]

[2] Pedersen v. Delaware, L. & W. R. R., 229 U. S. 146 (1913).

[3] See also St. L.. San Francisco, *etc.*, Rwy. v. Seale, 229 U. S. 156; N. Y. Central R. R. v. Carr, 238 U. S. 260 (1915); Ross v. Sheldon, 154 N. W. 499 (Iowa 1915). See also the annotation of the last of these cases, elsewhere in this issue of the REVIEW, 64 UNIV. OF PENNA. L. REV. 312.

[4] Second Employers' Liability Cases, 223 U. S. 1, 55 (1912); Missouri Pac. Rwy. v. Castle, 224 U. S. 541, 544 (1912); Mich. Central R. R. v. Vreeland, 227 U. S. 59, 67 (1913); Weir v. Rountree, 173 Fed. 776 (1909).

Another proposition which has passed the stage of controversy is that when Congress does act in regard to matters which have previously been the proper subjects of state regulation, the exercise of its authority overrides all conflicting state legislation upon the same subject matter.[5] This leaves as the disputed point in the principal case the question whether this liability for injuries to employees engaged in interstate commerce is capable of division into liability based upon negligence and liability not based upon negligence.

A review of the decisions in similar cases fails to throw much light on the probable attitude of the United States Supreme Court, when the case is presented for final disposition by it. In the cases involving the Federal Hours of Service Law,[6] the statutes declared unconstitutional were unquestionably regulations of the same subject concerning which Congress had already acted. As an illustration, the act of Congress having provided that a certain class of employees should not remain on duty for more than nine hours in every twenty-four, a New York statute, which provided that such class of employees should not remain on duty for more than eight hours in every twenty-four, was held unconstitutional.[7] In the cases involving the use of ferries, the inference, if any can be drawn, is that the principal case was wrongly decided. The Interstate Commerce Act [8] defines the term "railroad" as including "all bridges or ferries used or operated in connection with any railroad." Under this clause it has been held that as to a ferry operated by a railroad an ordinance of a state, fixing the rates for passengers using the ferry not in connection with the railroad, is void, since the entire regulation of such a ferry is within the control of Congress.[9]

Certain expressions of opinion by the Supreme Court likewise seem to indicate that they regard the Federal Employers' Liability

[5] Cooley v. Board of Wardens, 12 How. 299 (1851); Gloucester Ferry Co. v. Penna., 114 U. S. 196 (1885); Southern Ry. Co. v. Reid, 222 U. S. 424 (1912).

[6] Act of March 4, 1907, 34 Stat. 1415, c. 2939.

[7] Erie R. R. v. New York, 233 U. S. 671 (1914). See also Nor. Pac. Rwy. v. Washington, 222 U. S. 370 (1912).

[8] Act of February 4, 1887, c. 104, 24 Stat. 379.

[9] N. Y. Central R. R. v. Hudson Co., 227 U. S. 248, 263 (1913). "It is insisted that as the text [of the Interstate Commerce Act] only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all the business of the ferries between the two states was interstate commerce within the power of Congress to control and subject in any event to regulation by the state as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried in by means of the ferries, free from control by the state." See also Port Richmond Ferry v. Hudson Co., 234 U. S. 317 (1914).

Act as being an assumption of Congressional control over the entire field of liability of interstate railroads to their employees engaged in such commerce, although in the particular cases, the distinction between the two kinds of liability was not important and not emphasized. In *Seaboard Air Line* v. *Horton*,[10] it was said: "It was the intention of Congress [in the Federal Employers' Liability Act] to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence." And in an earlier case, *Mich. Central R. R.* v. *Vreeland*,[11] the court said: "It therefore follows that in respect to state legislation prescribing the liability of such [interstate] carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive and must remain so until Congress shall again remit the subject to the reserved police power of the states."

However, as is pointed out by Mr. Justice Seabury in his opinion in the principal case, it must be remembered that a workmen's compensation law is radically different in principle, purpose, scope and method from an employers' liability act, and this difference is entitled to due consideration. It should also be noted that the New York legislature, in passing the compensation act, contemplated the present exigency by expressly providing that the act should not apply to employees engaged in interstate commerce, for whom a rule of liability or method of compensation had been or may be established by the Congress of the United States.[12]

P. C. W.

CONSTRUCTIVE TRUSTS—CAN A MURDERER ACQUIRE TITLE BY HIS CRIME AND KEEP IT?—The authorities are most decidedly in conflict in determining the status of one who murders another and then seeks to acquire property as a result of his crime. This situation does not present itself as infrequently as one might suppose. The problem usually arises where a beneficiary in a life insurance policy slays the person whose life was insured, but it also occurs from time to time where a devisee claims under the will of his victim or where the murderer is the statutory heir of him whose life he has taken.

One line of decisions, impressed by the obvious injustice of allowing the criminal to prosper as a result of his wrong, reaches the conclusion that the murderer does not acquire title to the property at all. This is the view universally held with regard to the

[10] 233 U. S. 492, 501 (1914).

[11] *Supra*, note 4.

[12] N. Y. Laws of 1914, c. 41, § 114; Matter of Jensen v. Southern Pac. Co., 215 N. Y. 514 (1915).

insurance cases.[1] It is not necessary that there should be an express exception in the contract of insurance forbidding a recovery under such circumstances. The death of the insured caused by the beneficiary is regarded, on considerations of public policy, as an implied excepted risk. In the same way, it has been frequently held that a person who is criminally responsible for the death of another, whether the crime be murder or manslaughter, cannot take anything under the will of the deceased.[2]

But there are many authorities which are not so completely impressed by public policy considerations.[3] These cases hold that a murderer who happens to be the statutory heir of his victim does acquire the legal title to the property of the deceased, and, moreover, may keep the property thus acquired. These courts proceed upon the theory that where a statute of descent or distribution is plain and unambiguous in its terms, there is no room for construction or interpretation, and it operates solely within its own terms, vesting in the heir such estate as he is entitled to immediately upon the death of the intestate. Since relationship to the decedent, and not the conduct of the heir, is made the controlling factor in statutes of descent, the courts feel that it would be judicial legislation if public policy considerations were permitted to influence the decision.

These authorities distinguish between a case where the title passes by reason of the voluntary act of the testator, *i. e.*, by his last will and testament, and a case where the title passes unconditionally by operation of the positive law of the state. The former situation is regarded as analogous to those cases where a fraudulent abuse of a contract right is held to forfeit one's rights in the contract; but since in the latter situation the law itself casts the descent, nothing can be done but strictly to follow the peremptory mandate of the statute. In making this distinction, the courts apparently overlook the fact that our statute-books not only provide in express terms how the property of an intestate shall devolve, but also that no will shall be revoked except by certain enumerated acts and under certain enumerated circumstances, among which the criminal misconduct of the devisee or legatee is not to be found. If,

[1] Prather v. Michigan Mutual Life Ins. Co., Fed. Cas. No. 11,368 (1878); N. Y. Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591 (1886); Anderson v. Life Ins. Co. of Va., 152 N. C. 1 (1910); Filmore v. Metropolitan Life Ins. Co., 92 N. E. 26 (Ohio 1910); Metropolitan Life Ins. Co. v. Shane, 135 S. W. 836 (Ark. 1911); Box v. Lanier, 112 Tenn. 393 (1903); Cleaver v. Mutual Association, 1 Q. B. 147 (Eng. 1892).

[2] *In re* Hall, 109 L. T. Rep. 587 (Eng. 1913); *In re* Crippen, 104 L. T. Rep. 224 (Eng. 1911); Riggs v. Palmer, 115 N. Y. 506 (1889).

[3] Carpenter's Estate, 170 Pa. 203 (1895); Owens v. Owens, 100 N. C. 240 (1888); Deem v. Milliken, 6 Ohio C. C. 357 (1892); Holdim v. Ancient Order, 159 Ill. 619 (1896); *In re* Gollnik's Estate, 128 S. W. 292 (Minn. 1910); McAllister v. Fair, 84 Pac. 112 (Kan. 1906); Shellenberger v. Ransom, 41 Neb. 631 (1894).

therefore, it be judicial legislation to engraft an exception upon the terms of the statutes regulating the devolution of an intestate's property, it is similarly judicial legislation to hold that the statutes providing how wills shall be revoked are subject to an implied provision, namely, that legacies or devises are revoked *pro tanto* if the legatee or devisee slay the testator.

In a number of jurisdictions, statutes have been enacted to meet the situation.[4] Despite this legislation, however, there has been some doubt as to its application to particular cases, and such statutes are usually construed strictly.[5]

A novel means of evading the rule that the statutory heir may acquire title and keep it was resorted to in a Missouri case.[6] It was there held that the term "widower," as used in the statute making him the heir in the absence of children, means one who has been reduced to that condition by the ordinary and usual vicissitudes of life, and not one who by a felonious act, has himself created that condition.

The true *ratio decidendi* that should have been applied in all these cases was pointed out with characteristic clearness and precision by the late Dean Ames.[7] The theory is that the *legal title* does pass to the murderer, but equity, acting *in personam,* will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and will compel him to convey it to the heirs of the deceased, exclusive of the murderer. The principle was thus put in *Ellerson* v. *Westcott,*[8] the only case that clearly bases its decision upon the theory advanced by Dean Ames: "The relief which may be obtained against her (the murderess and devisee) is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a civil right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution and deprive her of the use of the property."

In the recent English case of *In re Houghton,*[9] the court quoted at length from the opinion delivered by Mr. Justice Green in the Pennsylvania case of *Carpenter's Estate,*[10] and subscribed wholeheartedly to the prevalent view that where a statute casts the descent in express terms, the courts cannot prevent the murderer from in-

[4] Tennessee, Act of 1895, p. 22, Chap. 11, § 1. California, Civil Code, § 1409.

[5] See *In re* Kirby's Estate, 121 Pac. 370 (Cal. 1912). See also Beddingfield v. Estill, 118 Tenn. 39 (1907).

[6] Perry v. Strawbridge, 209 Mo. 621 (1908).

[7] Can a Murderer Acquire Title by His Crime and Keep It? 45 UNIV. OF PENNA. LAW REVIEW, 225 (April, 1897).

[8] 148 N. Y. 149 (1896).

[9] 113 L. T. Rep. 422 (Eng. 1915).

[10] *Supra,* note 3.

heriting his victim's property and cannot restrain his enjoyment of the property thus acquired.

It is to be regretted that the equitable doctrine enunciated by Dean Ames was not made the basis of this decision. The Pennsylvania case is undoubtedly correct as far as it goes, but it stops short of the true principle. The legal title, the *res,* does pass to the murderer as heir or devisee of his victim. But it should not be forgotten that Equity, acting *in personam,* compels one who by misconduct has acquired a *res* at common law, to hold the *res* as a constructive trustee for the person wronged, or if he be dead, for his representatives. It is this fundamental equitable theory that has been overlooked in nearly all the cases in which the question has arisen, and it is unfortunate that the case of *In re Houghton* did not prove an exception.

L. E. L.

EQUITY JURISDICTION—CAN A BLACKLIST BE ENJOINED?—Out of the struggle between the forces of united labor and those of capital have arisen many complicated questions of law. May organized labor lawfully strike for higher wages, shorter hours, or improved shop conditions? Shall employees be allowed to strike merely to compel a "closed shop"? May the members of a union institute a boycott against one who refuses to unionize his shop, by threatening to leave their employers unless the latter insist upon their customers refraining from doing business with him who employs non-union men? These are typical of the questions with which the courts have been often confronted.

The real cause of the difficulty is the fact that in these cases there arises a conflict between two apparent legal rights. As the employer has a right to employ whom he chooses and to trade with whom he will, so has the employee a legal right to refuse to work for whom he chooses, and for any reason whatsoever. True the employee owes to the employer a duty not to interfere with the carrying on of the employer's business, yet this same employee has a legal right to see to his own advancement. Should a working man be prevented from refusing to work for an employer who allies himself with the enemies of labor, even though this action of the employee would interfere with the employer's right to a free market?

Some courts have attempted to solve the problem by applying the following test: Is the object of the strike or boycott a legal one and are legal means employed in carrying it on? Under the application of this test strikes and boycotts for higher wages, shorter hours and improved shop conditions have been held to be lawful [1] and will not be enjoined unless they are carried on in an unlawful

[1] Pickett v. Walsh, 192 Mass. 572 (1906).

manner.[2] On the other hand a strike or a boycott instituted merely to compel a closed shop has been held not to be justifiable on the principles of competition.[3] In the debatable ground between these extremes the conflict of rights must be adjudicated as new conditions arise. In the absence of legislative action, it seems that this is the best test that can be applied.

The task of the Court is more difficult in regard to the counter action of the employer, the blacklist. When and to what extent should an employer be permitted to form a combination with other employers to refuse employment to striking employees?

In the first cases in which this subject arose the courts refused to enjoin the defendants on the ground that the rights alleged to be violated were personal and not property rights and that there were no approved precedents in equity for issuing such an injunction.[4] The later decisions recognized the fact that labor, as well as capital, is entitled to certain rights and protection from unlawful interference, and granted injunctive relief against combinations to blacklist.

In this connection it is interesting to note the recent case of *Cornellier* v. *Haverhill Shoe Manufacturers' Association et al.*[5] The Court refused to grant an injunction to prevent the employers from using a blacklist because of the doctrine, "He who seeks equity must come in with clean hands." [6] Nevertheless it was intimated that a blacklist is open to the same legal objections as is a boycott and if found to be unlawful will be enjoined. It seems that the decision is proper and logical. Once the courts have decided to lay down rules to govern this class of case, they should apply the same tests and the same rules without considering whether it is labor or capital, the acts of which are complained of.

It might well be said that the courts never should have been forced to decide these questions. These struggles effect not only the contestants in each particular case, but the entire community at large. As the courts have no settled legal principles to guide them, they have been forced to render their decisions upon the ground of public policy. As a result the decisions are influenced more or less by the personal opinions of the courts that render them.

It is submitted that this whole question, which is one of ever

[2] Butterick Pub. Co. v. The Union, 100 N. Y. Supp. 242 (1906); Christensen v. Supply Co., 110 Ill. App. 61 (1903).

[3] Parvis v. Local No. 500, *etc.*, 214 Pa. 348 (1906).

[4] Worthington v. Wuring, 157 Mass. 198 (1892). See also Boyer v. Western Union Tel. Co., 124 Fed. 246 (1906).

[5] 109 N. E. 643 (Mass. 1915).

[6] The employees had struck for higher wages and had conducted the strike in an unlawful manner by rioting. It was because the plaintiff had assisted in the unlawful carrying on of the strike that the court refused to give him relief from the subsequent blacklisting conducted by the employers.

growing importance, should be controlled by legislative action and that not until that time will this industrial warfare be governed by a definite and fixed set of rules and standards.

G. F. D.

FEDERAL EMPLOYERS' LIABILITY ACT—SCOPE AND APPLICATION—WHEN IS AN EMPLOYEE ENGAGED IN INTERSTATE COMMERCE?—The first section of the Federal Employers' Liability Act of 1908[1] provides that every common carrier by railroad, "while engaging" in interstate commerce, shall be liable for the injury or death of an employee, due to negligence, "while he is employed by such carrier in such commerce." To recover under this act, therefore, the employee must have been at the time of the injury engaged in interstate commerce. But when is a man employed in interstate commerce within the act? This question has frequently arisen since the passage of the act, and has in many instances produced considerable difference of opinion among the courts.

The clearest case is one in which the injured employee was at the time actually engaged in the operation of an interstate train. This would apply to engineers,[2] firemen,[3] brakemen,[4] and others working on such a train. Going a step further, it has been held that a workman who couples cars, some of which are engaged in interstate commerce and some not, is likewise engaged in such commerce.[5] Members of switching crews at railroad terminals while engaged in moving cars containing interstate shipments are also held to be employed in interstate commerce, within the meaning of the act.[6] But if at the moment of the accident the employee is switching cars which contain only interstate shipments, he is not within the act, although a few minutes before he was moving interstate cars.[7] Moreover if a yard clerk who has the duty of making a record of trains brought into and sent out of the terminal yard, is killed while performing these duties with respect to an interstate train, he is considered to fall within the act.[8] This may seem to extend the doctrine beyond its proper limits, but it is the rule of the United States Supreme Court.

The case of persons repairing instrumentalities connected with interstate commerce has caused the courts some difficulty. It seems

[1] Act Apr. 22, 1908, c. 149, § 1, 35 U. S. Stat. at L. 65.
[2] Borton v. Seaboard Air Line Rwy. Co., 157 N. C. 146 (1911).
[3] Rowlands v. Chicago & N. W. Rwy. Co., 149 Wis. 51 (1912).
[4] Vaughan v. St. Louis & S. F. Rwy. Co., 177 Mo. App. 155 (1914).
[5] Johnson v. Great Northern Rwy. Co., 178 Fed. 643 (1910).
[6] Montgomery v. Southern P. Rwy. Co., 64 Ore. 597 (1913).
[7] Illinois Cent. Rwy. Co. v. Behrens, 233 U. S. 473 (1914).
[8] St. Louis, S. F. & T. Rwy. Co. v. Seale, 229 U. S. 156 (1913).

that one who manufactures an engine, or lays a track for future use in interstate commerce, should be held to be preparing for such commerce, rather than to be engaged in it. Therefore it is declared that one who merely constructs a tunnel through which interstate trains are expected to pass is nevertheless not engaged in interstate commerce.[9] But persons repairing engines or cars, or tracks or switches, used indiscriminately in interstate and intrastate commerce, are regarded as within the act.[10] In a leading case[11] an ironworker was struck by a train and killed while carrying from a tool car to a bridge, over which both interstate and intrastate trains were accustomed to run, a sack of rivets which were to be used the next morning in repairing the bridge, the repair to consist of taking out an old girder and putting in a new one. It was held by a divided court that the decedent was at the time of his death employed in interstate commerce.[12]

The cases already cited constitute only a few of the large number in which the problem has arisen; but they show that the tendency of the courts is very strongly in favor of declaring a railroad employee to have been engaged in interstate commerce within the purview of the Federal Employers' Liability Act, whenever it is reasonably possible so to hold. It is difficult, however, to deduce from the cases a definite test which will serve as a touchstone in determining whether or not a particular individual is employed in interstate commerce.

The case of *Lamphere* v. *Oregon, etc., Co.*[13] advances the following as a test: "Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?" This seems faulty, as it is conceivable that an injury to a person employed solely in intrastate commerce might nevertheless hinder interstate transportation. The Pedersen case, a leading case on this question,[14] declared that the true test always is: "Is the work in question a part of the interstate commerce in which the carrier is engaged?" But the court said, "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and

[9] Jackson v. Chicago, St. P. & M. Rwy. Co., 210 Fed. 495 (1914).

[10] Northern P. Rwy. Co. v. Maerkl, 198 Fed. 1 (1912); Southern Rwy. Co. v. Howerton, 105 N. E. 1025 (Ind. 1914).

[11] Pedersen v. Delaware, L. & W. Rwy. Co., 229 U. S. 146 (1913).

[12] The dissenting judges thought that the work in which the deceased was engaged at the time was not a part of commerce, but an incident which preceded it; and that the "commerce" meant by the act was confined to transportation.

[13] 196 Fed. 336 (1912).

[14] *Supra*, note 11.

during their use as such." A distinction is therefore suggested between original construction of instrumentalities for future use in interstate commerce, and the maintenance and repair of instrumentalities after they have entered into use in such commerce.

Another test has been suggested by an annotator:[15] "Did the condition, both in respect of the source of the danger and of the hazardous situation of the employee, arise out of the operation of interstate commerce?"[16] A text-writer says, "All who are at the time of the injury engaged in duty which has direct relation to the interstate business of the carrier are entitled to the protection of the act."[17] The same writer goes on to say,[18] "These general terms include the vast majority of the employees of an interstate railroad who may be affected by peril of accident, for, as railroads are practically conducted, there are few employees whose duty is so purely local that they have no relation to interstate traffic."

These tests are obviously all general in their terms, and are after all of comparatively slight value when a particular set of facts is presented for judicial decision. It is perhaps best not to seek a technical rule which will automatically answer the problem, but rather to examine the facts with a view to determining whether they fall within the true spirit and intent of the Employers' Liability Act, which, it is submitted, should in this respect be liberally construed. And there is no doubt that it has been so construed in the vast majority of cases.

With all the precedents before it, it is easy to account for the decision handed down in a recent case by the Supreme Court of Iowa.[19] An electric railway company was engaged in both interstate and intrastate commerce. Alongside its track was a row of poles bearing cross-arms, on which were strung various wires, including a single wire which was part of the block signal system. The company decided to substitute a more efficient system and for this purpose a lineman was sent up on the poles to nail up additional cross-arms, which were to bear the old signal wire and five or six new signal wires, all being intended for use in the new system. While so engaged, the lineman was killed by an electric shock. It was held by five judges that at the time of his death the decedent was employed in interstate commerce within the meaning of the federal act. Two judges were of the opposite opinion.

It was argued by counsel for the railroad, harking back to the distinction in the Pedersen case,[20] that the work in which the de-

[15] In 6 Neg. & Comp. Cases Annotated, p. 198.

[16] He says further, "It must be borne in mind in this regard that mixed intrastate and interstate commerce constitutes interstate commerce."

[17] Doherty: Liability of Railroads to Interstate Employees, p. 88 (ed. 1911).

[18] *Idem*, p. 89.

[19] Ross v. Sheldon, 154 N. W. 499 (Ia. 1915).

[20] *Supra*, note 11.

cedent was engaged was not that of repair or maintenance, but was new construction work. The court declared, however, that the work was for the purpose of improving the road and maintaining "sufficiency in its equipment," and that in such case the distinction between "repair" and "construction" should not be drawn too fine.[21] The dissenting judges, however, clung to the view that the deceased was not engaged in the repair of an instrumentality which had theretofore been used in both intra and interstate commerce.

In both opinions, the Pedersen case [22] was cited as a sustaining authority. It seems, however, that the decision of this case goes far toward doing away with the distinction suggested in the earlier case between construction and repair. The effect of the conclusion reached is practically that an improvement in interstate railroad service, even though it really be a new construction, is a part of interstate commerce.[23]

In this connection one thing, in particular, should be noted. The original Employers' Liability Act of 1906,[24] which provided that an interstate carrier should be liable for injury or death of "any of its employees," was held unconstitutional because it included all employees," whether engaged in interstate commerce or not.[25] The act of 1908 [26]—the present act—was intended to remedy this defect in the first act, by restricting liability to the case of an employee injured or killed "while he is employed" in interstate commerce. The principal case illustrates the present tendency to construe the second act to include almost all employees of interstate carriers, and thus to render the act of 1908 nearly as broad as the act of 1906.

E. E.

[21] Mr. Justice Evans, in rendering the opinion of the court, mentions the fact that the old wire was to be used in conjunction with the new, and that the additional wires therefore did not constitute an independent construction. Mr. Chief Justice Deemer, dissenting, thought that that fact was immaterial. "Surely," he says, "if the plaintiff had been engaged in the construction of another track to make a double-track road, which new track had never been used in commerce of any kind, the use of old rails which had once been used in interstate commerce, even as a part of a railway engaged in interstate commerce would not affect the matter in any way."

[22] *Supra,* note 11.

[23] There is a similar case, Grow v. Oregon Short Line R. Co., 138 Pac. 398 (Utah 1913), which the court failed to cite. There it was held that one employed in installing a block signal system was engaged in interstate commerce.

[24] Act June 11, 1906, c. 3073, § 1, 34 U. S. Stat. at L. 232.

[25] The Employers' Liability Cases, 207 U. S. 463 (1908).

[26] *Supra,* note 1.